IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.01.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

C.M.A.NOS.2449 AND 2529 OF 2010
AND M.P.NOS.1 AND 1 OF 2010

CMA NO.2449 OF 2010

Indcon Structures Pvt. Ltd.,
Rep. by its Authorised Official
161, Greams Road,
Chennai - 600 006. .. Appellant in CMA.2449/10 and 1st respondent in CMA.2429/10 (Petitioner)

Vs.

1.The Employees' State Insurance Corporation
Regional Office (Tamil Nadu)
"Panchadeep Bhavan"
143, Sterling Road,
Nungambakkam,
Chennai - 600 034. ..1st Respondent in CMA.2449/10 and Appellant/Respondent in CMA.2529/10 (1st Respondent)

2.The Senior Manager
Canara Bank
Thousand Lights Branch
5, Greams Road,
Chennai - 600 006. ..2nd Respondents in Both CMA's/ 2nd Respondent

COMMON PRAYER: Civil Miscellaneous Appeal filed under Section 82(2) of the Employees' State Insurance Act, 1948, against the order of the Presiding Officer of the Employees' Insurance Court (Principal Labour Court, Chennai) dated 29.09.2009 made in E.I.O.P.No.459 of 2001 with regard to those portions / limbs of the order which have negatived the claim of the appellant for interest on the excess amount collected and lying in the hands of the Corporation and to set aside the same respectively.

For Appellant in CMA.2449/10 and For Respondent-1 in CMA.2529/10 : Mr.K.Ashok Kumar

for Appellant in CMA.2529/10
and For the 1st Respondent in
CMA.2449/10 : Mrs.S.Jothivani

COMMON JUDGMENT

Two appeals have arisen out of an order passed in EIOP No.459 of 2001 dated 29.09.2009 on the file of Employees Insurance Court (Principal Labour Court) Chennai. CMA No.2449 of 2010 has been filed by M/s.Indcon Structurals Private Limited and CMA No.2529 of 2010 has been filed by the Employees' State Insurance Corporation.

2. For the sake of convenience, the parties are named as per their litigative status before the Insurance Court.

3. The petitioner is a Company against whom an order under Section 45-A of the ESI Act, 1948, came to be passed on 05.10.1999 with regard to contribution be made to to the Employees' State Insurance Corporation. Since the petitioner failed to produce the records for the determination of contribution, even after notice, the Employees' State Insurance Corporation has passed an order under Section 45-A of the ESI Act, dated 05.10.1999. Thereafter, a recovery certificate under Form - C (19) was issued on 21.01.2000. Thereafter, on 02.02.2000, a Garnishee notice was issued under Section 45-G of the ESI Act to the Banker of the petitioner company. On 20.07.2000, notice of demand was issued to the petitioner company for recovery of the contribution. Thereafter, on 21.08.2000, the petitioner company had approached the Corporation stating that opportunity was not given to them for personal hearing and that they have deposited a cheque for a sum of Rs.42,079/- as full and final settlement of the dues pursuant to the order dated 07.09.2000. Even after receipt of cheque, the Employees' State Insurance Corporation had proceeded with the matter and recovered money through the Bank and discharged Bankers from the proceedings.

4. Aggrieved over the same, the petitioner has preferred Employees' Insurance Original Petition before the Employees' Insurance Court assailing the order under Section 45-A dated 05.10.1999. The Employees' Insurance Court after hearing the matter, issued a direction to the petitioner Company to pay a sum of Rs.28,867/- and further directed the Employees' Insurance Corporation to refund a sum of Rs.4,36,285/- recovered from the petitioner through the Bank.

5. Aggrieved over the non award of interest for the amount directed to be refunded, the petitioner Company preferred an appeal.

6. The Employees' State Insurance Corporation has also preferred an appeal on the ground that the petitioner Company failed to produce the records before it for passing orders and

therefore, the matter should be remanded back for fresh consideration on the basis of the records produced before the Employees' Insurance Court.

7. The Employees' Insurance Court during the pendency of the appeal, has directed the ESI Inspector of the respondent Corporation to audit the records produced by the petitioner Company and to submit a report. The ESI Inspector after going through the records made available before him, has prepared a report and sent it to the Regional Director, Employees' State Insurance Corporation. In turn, the Regional Director, Employees' State Insurance Corporation has submitted the said inspection report by way of a memo before the Insurance Court and sought for disposal of the original petition on the basis of the same. The report was marked as Ex.R12. As per the report, contribution has been assessed under 13 heads to the tune of Rs.85,484/-. The Employees' Insurance Court had found that there is no dispute with respect to 10 heads as the petitioner Company has agreed to make the contribution i.e., a sum of Rs.28,867/-. Since a sum of Rs.42,079/- was already tendered and encashed by the Insurance Corporation, the balance amount of Rs.13,212/- was held to be paid by the petitioner Company.

8. While deciding the issue, the Employees' Insurance Court has found that (i) the petitioner company is entitled to refund of Rs.4,36,285/-; (ii) the petitioner shall pay a sum of Rs.28,867/- by way of contribution to ESI Corporation; and (iii) the petitioner company is not entitled to any interest on the recovered amount.

9. This Court, while disposing of the above appeals, had remanded the matter for fresh consideration before the ESI Corporation. The petitioner Company preferred an appeal before the Hon'ble Supreme Court and a direction was issued by the Hon'ble Supreme Court in Civil Appeal Nos.2801-2802 of 2014 (arising out of SLP (C) Nos.36475-36476 of 2011) dated 21.02.2014 that the High Court itself shall decide the entire issue and the order of remand was set aside.

10. Accordingly, the matter was taken up for final hearing and both sides have made their submissions.

11. According to the learned counsel for the Employees' State Insurance Corporation, the petitioner Company had failed and neglected to produce the records in spite of show cause notices issued to them in several occasions. If the order passed under Section 45-A of the ESI Act is set aside, they shall be given an opportunity to assess the contribution on the basis of the records produced during the pendency of the Employees' Insurance Original Petition. The Employees' Insurance Court ought not to have passed orders on the basis of the inspection report, which does not fully reveal the actual state of affairs. The petitioner Company has produced

limited records and the report does not disclose the complete assessment and therefore, the order passed by the Court below is liable to be set aside and the authorities of the Corporation shall be permitted to assess and determine the contribution on the basis of records.

12. The contention of the petitioner Company is that during the pendency of the employees' insurance original petition, the ESI Inspector has verified the records and it was accepted by his higher authorities and a memo was filed for passing orders on merits on the basis of his report. In such an event, the respondent Corporation is not entitled to question their own report, on the basis on which, final orders were passed. Secondly, as per Section 45-A of the ESI Act, when conditional deposit was made before the Appellate Authority, the petitioner would be entitled to interest in the event of succeeding in the appeal. Similarly, when the ESI Court has allowed the application, they ought to have ordered interest and the denial of interest is illegal. Therefore, another appeal was filed by the petitioner Company in so far as the demand of interest was rejected by the Court below.

13. It is seen from the records that on 05.10.1999, an order under Section 45-A of the ESI Act determining the contribution came to be passed by the Insurance Corporation. In spite of the same, the petitioner Company had failed to agitate the matter by depositing the amount determined under Section 45-A of the ESI Act. The Insurance Corporation having no other alternative, had to proceed with the recovery proceedings and to recover the amount. After the recovery ordered, the petitioner Company came forward to deposit the sum of Rs.42,079/- and the same was also encashed by the Insurance Corporation. It is also seen that during the pendency of the appeal, the petitioner Company had produced the records for the purpose of assessment before the Court. The Court also has further directed the ESI Inspector to inspect the records and assess the actual contribution to be made. The Insurance Inspector has assessed the contribution under all 13 heads as Rs.85,484/-. Therefore, the Insurance Court has come to a conclusion that recovery of Rs.4,36,285/- is erroneous and in excess of the dues. Curiously, the report of the ESI Inspector, as approved by the Regional Director, Employees' State Insurance Corporation, which was marked as Ex.R12, was not objected to by either parties. The total contribution to be made for all the 13 heads was Rs.85,484/-. The petitioner Company had admitted its liability in so far as 10 heads are concerned. If that contribution is segregated, it works out to Rs.28,867/-. Therefore, a direction was issued to the petitioner company to deposit a sum of Rs.28,867/-. But strangely, there was no finding as regard to the liability of contribution in so far as the 3 heads, which was contested by the petitioner Company.

14. The Employees' Insurance Court had considered the contentions of the petitioner Company as well as the Employees' Insurance Corporation on the aspects of liability under the 3 heads. Since the petitioner Company has failed to challenge the quantum of contribution determined by Ex.R12 - ESI Inspector's report, that has become final. Since the petitioner Company has already deposited a sum of Rs.42,079/- on 21.08.2000, by way of cheque, which was also encashed by the Insurance Corporation, that amount has to be adjusted from the total contribution determined. After adjusting this amount, still the petitioner Company is due to make the balance payment out of Rs.28,867/-.

15. The contention of the learned counsel for the Corporation would be that the operative portion of the order passed by the Court below is without any reason and it is not in conformity with the discussions made in the order. Therefore, the entire order is liable to be set aside. But, this Court is of the considered opinion that both the parties have accepted the quantum of determination of contribution as per Ex.R12 at Rs.85,484/- and they cannot challenge the same at this distance point of time. The question of liability in respect of the 3 heads as contested by the petitioner Company can be decided at a future event and it cannot be decided, as the order in this particular issue, has become final and there was no appeal in respect of the same.

16. Therefore, this Court is of the considered opinion that the determination of liability, contribution has reached finality. As per the inspection report submitted by the Employees' State Insurance Corporation, the same shall be directed to be adjusted from the amount recovered by the ESI Corporation. By the recovery proceedings, the Employees' State Insurance Corporation has recovered a sum of Rs.4,36,285/- from the Bankers of the petitioner company. Apart from this, the petitioner has also deposited a sum of Rs.42,079/- on their own volition, which was also encashed by the Insurance Company. Further, the sum of Rs.85,484/- shall be deducted from the recovered amount and the balance shall be refunded to the petitioner Company.

17. In so far as the award of interest is concerned, as per Section 45-A(a) of the Employees' State Insurance Act, 1948, the conditional deposit would fetch interest in the event of success by the petitioner. But in the instant case, the petitioner Company has not produced the records on the pretext that it is pending before the excise authorities. Finally, they have produced the records only in the year 2003. Non-production of records made the ESI Corporation to pass orders under Section 45-A of the ESI Act and to recover the dues. Such an action, according to the statute, cannot be found fault with. The petitioner by his demand draft dated 21.08.2000 has admitted its liability in respect of 10 heads and deposited a sum of Rs.42,079/-. Whereas, as per the

Inspection Report, it was assessed only as Rs.28,867/-. In so far as 3 heads are concerned, the liability is under dispute, whereas there is no finding as to the same.

18. The case on hand requires further evidence, on the basis of the documents filed by the petitioner Company. But in view of the direction issued by the Hon'ble Supreme Court, the matter has to be decided on merits without remanding the same. Therefore, the issue of liability in respect of above 3 heads is left out for the petitioner Company to agitate the same in future.

19. Since Ex.R12 is accepted and not challenged by both the parties, for the present, this Court fixes the total contribution as Rs.85,484/- and the same shall be deducted from Rs.4,36,285/- recovered by ESI Corporation from the petitioner's bankers and the balance has to be refunded within a period of one month from the date of receipt of a copy of this order. The petitioner Company is entitled to interest on the deposit made by them to the tune of Rs.42,079/- at the rate of 12% per annum from the date of acceptance of the ESI Inspector's report by the Regional Director till the date of payment. For the remaining amount, there shall be no interest as the petitioner Company has also caused delay in passing the impugned order.

20. With the above observations and directions, both the Civil Miscellaneous Appeals are disposed of. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS-VI)

//True Copy//

Sub Assistant Registrar

TK
To
The Presiding Officer of the employees Insurance Court,
Principal Labour Court, Chennai.
Copy to: The Section Officer,
VR Section, High Court, Madras.
+ 1 cc to M/s. S.S. Jothivani, Advocate Sr.1070, 1071
+ 1 cc to Mr.K. Ashok Kumar, Advocate Sr.1067, 1068

C.M.A.NOS.2449 AND 2529 OF 2010

RAY(CO)
EU(23/03/2018)